INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutory provisions involved	2
Statement of the Case	5
Reason for granting the writ	6
Conclusion	8
Appendix—Opinions below—None	9
—Judgment of State Court	9

CITATIONS

Cases:

	Page
Cole v. Arkansas, 333 US 196; 68 S. Ct. 514; 92 Led 644 (1948)	6
Frank v. Mangum, 237 US 309; 35 S. Ct. 582; 59 Led 969 (1915)	6
Gordon Creek Tree Farm Inc. v. Layne, 230 Or. 204; 358 P2d 1062; 368 P2d 737 (1961)	6, 7
Henry v. Mississippi, 379 US 443; 85 S. Ct. 564; 13 Led2d 408 (1965)	5, 7
NAACP v. Alabama, 377 US 288; 84 S. Ct. 1302; 12 Led2d 325 (1964)	7
Parrott v. Tallahassee, 381 US 129; 85 S. Ct. 1322; 14 Led2d 363 (1965)	7
Rogers v. Day, 232 Or. 185; 375 P2d 63 (1962)	7
Shipman v. Gladden, —Or.—; 453 P2d 921; 88 Or. Adv. Sh. 321 (1968)	6
Stant v. City of Baxley, 355 US 313; 78 S. Ct. 277; 2 Led2d 302 (1958)	7

CITATIONS (Continued)

Statutes

	Page
ORS 17.615	3
ORS 19.023	2,3
ORS 19.026	2,6
ORS 19.029	2,3
ORS 19.033	3
ORS 19.038	4,6
ORS 19.040	4
ORS 19.074	2
28 USC section 1257 (3)	1

Other Authorities

	Page
9 Holdsworth, History of English Law, p. 311 et seq.	7

BLEED THROUGH POOR COPY

In The

Supreme Court of the United States

OCTOBER TERM, 1969

No._____

STANLEY TERRY,
Petitioner,

v.

WILLIARD K. MARTIN
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The petitioner, Stanley Terry, respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of the State of Oregon entered in this proceeding on January 13, 1970.

OPINION BELOW

No opinion was rendered by the Courts below.

JURISDICTION

The judgment and order of the Supreme Court of Oregon was dated and entered on January 13, 1970. This petition for certiorari will be filed within 90 days of that date. The Court's jurisdiction is invoked under *28 USC section 1257 (3).*

QUESTION PRESENTED

May Oregon consistent with due process under the Fourteenth Amendment require two steps, both service on the adversary and filing with the trial court within thirty days, as a jurisdictional necessity for an appeal without possibility of excuse for failure of either although service has been accomplished within time and the additional filing accomplishes no legitimate state purpose?

STATUTORY PROVISIONS INVOLVED— OREGON REVISED STATUTES

19.023 How appeal taken. (1) An appeal to the Supreme Court or to the Court of Appeals shall be taken in the manner prescribed in ORS 19.023 to 19.190.

(2) A party to the judgment desiring to appeal therefrom, or some specified part thereof, shall cause a notice, signed by himself or his attorney, to be served on such adverse party or parties as have appeared in the action, suit or proceeding and file the original, with proof of service indorsed thereon or affixed thereto, with the clerk.

(3) The notice shall be in the form prescribed in ORS 19.029, shall be filed within the time prescribed in ORS 19.026, and shall be accompanied by the designation required by ORS 19.074.

19.026 Time for service and filing of notice of appeal. (1) Except as provided in subsections (2) and (3) of this section, the notice of appeal shall be served and filed within 30 days after the entry of the judgment appealed from.

(2) Where any party has served and filed a motion for a new trial or a motion for judgment notwithstanding the verdict, the notice of appeal of any party shall be served and filed within 30 days from the earlier of the following dates:

BLEED THROUGH POOR COPY

(a) The date of entry of the order disposing of the motion.

(b) The date on which the motion is deemed denied, as provided in ORS 17.615.

(3) Any party desiring to appeal may serve and file his notice of appeal within 10 days after the expiration of the time allowed by subsections (1) and (2) of this section.

(4) When more than one notice of appeal is filed, the date on which the last such notice was filed shall be used in determining the time for preparation of the transcript, filing briefs and other steps in connection with the appeal.

19.029 Contents of notice of appeal. The notice of appeal shall contain the following:

(1) The title of the cause.

(2) The names of the parties and their attorneys.

(3) A notice to the adverse party or his attorney that an appeal is taken from the judgment or some specified part thereof.
[1959 c.558 §5]

19.033 Jurisdiction effect of filing notice; relief from nonjurisdictional errors. (1) When the notice of appeal has been served and filed as provided in ORS 19.023 to 19.029, the Supreme Court or the Court of Appeals shall have jurisdiction of the cause, subject to a determination under ORS 2.520, but the trial court shall have such powers in connection with the appeal as are conferred upon it by law.

(2) The serving and filing of the notice of appeal as provided in ORS 19.023 to 19.029 is jurisdictional and may not be waived or extended.

(3) After the Supreme Court or the Court of Appeals has acquired jurisdiction of the cause, the omission of a party to perform any of the acts re-

quired in connection with an appeal, or to perform such acts within the time required, shall be cause for dismissal of the appeal. In the event of such omission, the court, on motion of the respondent or, after notice, on its own motion, may dismiss the appeal if in its judgment the omission is without reasonable excuse or it may permit the party responsible for the omission to rectify the omission, by amendment or otherwise, on such terms and within such time as may be just.

19.038 Filing of undertaking on appeal; exception to sureties. (1) Except as provided in ORS 19.045, within 10 days after the filing of the notice of the appeal, the appellant shall serve on the adverse party or his attorney an undertaking as provided in ORS 19.040, and within such 10 days shall file with the clerk the original undertaking, with proof of service indorsed thereon.

(2) Within five days after the service of the undertaking, the adverse party or his attorney may except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right thereto.

(3) The qualifications of sureties in the undertaking on appeal shall be the same as in bail on arrest, and, if excepted to, they shall justify in like manner.
[1959 c. 558 §8]

19.040 Form of undertaking on appeal; conditions for stay of proceedings; enforcement against sureties on dismissal of appeal. (1) The undertaking of the appellant shall be given with one or more sureties, to the effect that the appellant will pay all damages, costs and disbursements which may be awarded against him on the appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following:

BLEED THROUGH POOR COPY

(a) If the judgment or decree appealed from is for the recovery of money, or of personal property or the value thereof, that if the same or any part thereof is affirmed, the appellant will satisfy it so far as affirmed.* * *

STATEMENT OF THE CASE

Stanley Terry, the petitioner, desiring to appeal an adverse judgment dated October 20, 1969, of the Circuit Court of the State of Oregon for the County of Multnomah, served the statutory form of notice of appeal on the attorney for the adverse party, obtaining his acceptance of service within the thirty-day period provided by law (R. p. 11). However, because of petitioner's unfamiliarity with appeals, he neglected to file it with the trial court until December 11, 1969, which was after the thirty-day time limit (R. pp. 11, 17), apparently because he had an extension of time from the Circuit Court to file the undertaking on appeal on December 11, 1969 (R. pp. 5 - 8, 11, 12, 17).

Respondent moved to dismiss the appeal because of late filing of petitioner's notice of appeal (R. pp. 10-11) and failure to file undertaking on appeal (R. pp. 4-16) although his papers show service within the time allowed by orders of the Circuit Court.

Petitioner in his timely answer to this motion to dismiss challenged the constitutionality of the requirement of both service and filing within the thirty-day period to acquire jurisdiction as follows:

"4. Appellant relies upon Henry v. Mississippi, 379 US 443, 85 S. Ct. 564, 13 Led2d 408 (1965) for the proposition that appeal is a matter of right, and since the purpose of a notice of appeal is to notify

respondent and the purpose of an undertaking is to secure respondent, both of which purposes have been served, a requirement such as the timely filing required, contained in ORS 19.026-19.038, as applied to this case, has no legitimate State purpose and violates the due process clause of section 1, Fourteenth Amendment to the United States Constitution (R. pp. 17-18)."

The Supreme Court of Oregon dismissed the appeal without no opinion or reason given (R. p. 21).

REASONS FOR GRANTING THE WRIT

An appeal in a civil case in Oregon from the Circuit Court to the Supreme Court of Oregon is allowed as a matter of right. The notice of appeal must be both served upon the attorney for the adverse party and filed with the Circuit Court within thirty days. This is by statute ORS 19.033 jurisdictional and no failure may be excused although every other failure is freely excused. *Gordon Creek Tree Farm Inc. v. Layne*, 230 Or. 204, 210; 358 P2d 1062, 1065; 368 P2d 737 (1961).

A similar requirement for a criminal case where an attorney has served the notice of appeal within the statutory period but neglected to file it in that period has been held by the Supreme Court of Oregon to violate due process and to require allowance of a delayed appeal. *Shipman v. Gladden*, —Or.—; 453 P2d 921; 88 Or. Adv. Sh. 321 (1968).

While an appeal is not a due process requisite, once such appeal is allowed by State law its procedure must accord due process. *Cole v. Arkansas*, 333 US 196, 201; 68 S. Ct. 514, 517; 92 Led 644, 648 (1948); *Frank v.*

Magnum, 237 US 309, 327; 35 S. Ct. 582, 587; 59 Led 969, 980 (1915).

While either service or filing of the notice of appeal within thirty days would serve a legitimate State purpose of jurisdiction, there is no rationality in denying petitioner hi sappeal because both were not accomplished within this limited time period. *Henry v. Mississippi*, 379 US 443; 85 S. Ct. 564; 13 Led2d 408 (1965); *Stant v. City of Baxley*, 355 US 313, 320; 78 S. Ct. 277, 281; 2 Led2d 302, 310 (1958); *Parrott v. Tallahassee*, 381 US 129; 85 S. Ct. 1322; 14 Led2d 363 (1965); *NAACP v. Alabama*, 377 US 288, 293-302; 84 S. Ct. 1302, 1306-1311; 12 Led2d 325, 330-335 (1964).

Requirements such as this are widespread, a hangover from an age which delighted in judicial determinations which bore no relationship to the merits of the controversy. *9 Holdsworth, History of English Law*, p. 311 et seq.

While respondent denied the filing of the undertaking on appeal, this does not appear to figure into this dismissal, since the undertaking was filed within the time allowed by the Circuit Court (R. pp. 17, 19). In any event, the decisions of the Supreme Court of Oregon clearly indicate that no irregularity in the undertaking will occasion a dismissal of an appeal. *Rogers v. Day*, 232 Or. 185, 195; 375 P2d 63, 68 (1962), but the Supreme Court of Oregon feels obliged to respect the double jurisdictional requirement embodied in the statutes. *Gordon Creek Tree Farm Inc. v. Layne*, 230 Or. 204, 210; 358 P2d 1062, 1065; 368 P2d 737 (1961).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD R. LONERGAN,
Counsel for Petitioner.

APPENDIX

Opinions Below (None)

Judgment of State Court

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 6th day of OCTOBER 1969, WHEREUPON on this TUESDAY, the 13th day of JANUARY 1970, the same being the 41st judicial day of said term, when the following proceedings were had:

WILLARD K. MARTIN, Respondent, v. STANLEY TERRY, Appellant	)))))	Appeal from MULTNOMAH County No. 343-466

The court having duly considered respondent's motion to dismiss the above entitled appeal and the court being fully advised therein,

IT HEREBY IS ORDERED that said motion be and the same hereby is allowed and said appeal dismissed.

IT FURTHER IS ORDERED that respondent have and recover of and from appellant his costs and disbursements in this court taxed at $30.00.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter an order in accordance herewith. R 21.